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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioner,

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Memorandum and Order of the District Court, dated June 30, 1972, dismissing Petitioner's Complaint, appears in the Appendix (A-64-73) and is reported at *Jackson v. Metropolitan Edison Co.*, 348 F.Supp. 954 (M.D., Pa., 1972). The Judgment and Opinion of the

Third Circuit Court of Appeals dated August 21, 1973, affirming the decision of the District Court, appears in the Appendix (A-76-92), and is reported at 483 F.2d 754 (C.A. 3, 1973).

JURISDICTION

Jurisdiction of the Court below was invoked pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4). Petitioner's petition for rehearing before the court en banc was denied by the Third Circuit Court of Appeals by Order dated October 25, 1973, without opinion, and appears in the Appendix (A-93). The petition for writ of certiorari was docketed on December 3, 1973 and was timely filed pursuant to 28 U.S.C. §2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES, REGULATIONS AND TARIFFS INVOLVED

Pertinent sections of the Pennsylvania Public Utility Law, 66 Pa. Stat. Anno., §§451, et seq., 1101 et seq., are set forth verbatim in the attached Appendix. The following sections however, are of special import:

(a) §1171, establishing a duty of furnishing reasonably continuous service:

(b) §1341, conferring powers on the Pennsylvania Public Utility Commission over public utilities; and

(c) §1122, delegating to utilities authority to terminate service without the prior approval of the Commission.

The following Public Utility Commission Tariff and Electric Regulations are also set forth verbatim:

(a) Section II. Public Notice of Tariff Changes;

(b) Section VIII. Discount for Prompt Payment and Penalties; and

(c) Rule 14D. Access to Meters.

The termination of service tariff of Metropolitan Edison Company Electric Tariff, Electric Pa. P.U.C., No. 41, Rule 15, is also set out in the attached Appendix.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Respondent public utility acts under color of state law when it terminates a customer's electrical service for nonpayment of a disputed bill, where such utility has the following characteristics and the following relationship to the Commonwealth of Pennsylvania:

(a) It is a state sanctioned monopoly placed by the state in a position of favored economic power;

(b) It performs a public function in the supplying of essential electrical services;

(c) It acts in joint participation with the state, under extensive state regulation; in pursuing mutual goals, under a statutory obligation to furnish "reasonably continuous" electrical services, from which mutual benefits are derived;

(d) The state has specifically authorized, approved and encouraged the Respondent's challenged termination practices;

(e) The state has delegated to the Respondent its statutory responsibility to assure that customers are not arbitrarily and unlawfully deprived of "resonably continuous" electrical services.

II. Whether due process of law requires that Petitioner must be provided with adequate notice and opportunity to be heard before her essential utility services, which constitute a statutorily conferred entitlement or property right, may be terminated by Respondent for nonpayment of a disputed bill.

STATEMENT OF THE CASE

This case was filed by Petitioner as a civil rights action, pursuant to 42 U.S.C. §1983, challenging the discontinuance of her electrical services by Respondent on October 11, 1971, in the absence of due process of law, for failure to pay a disputed bill.

Petitioner, a welfare recipient,[1] had been a residential utility customer of Respondent Metropolitan Edison Company since March, 1969, when she moved into her home with her two minor children. (A-22). Although Mrs. Jackson was purchasing her home, she also shared some expenses with a co-occupant, one Dodson. (A-22,32). The electric bills were placed in Mrs. Jackson's name until September 1970, after which time they came to Petitioner's home in Dodson's name (A-24), who had assumed full responsibility for payment. Petitioner had been informed by Dodson that he was paying the bills and she believed this to be the case. (A-31, 32). Mrs. Jackson was not informed either by Dodson or the company that the bills were not being paid. (A-24). Although Dodson moved from the premises in August 1971, no electric bills came to Petitioner's home through October 11, 1971, the time of the termination of the services. (A-23, 33).

On Thursday, October 6, 1971, four days prior to the termination of her electric service, representatives of the Respondent company came to Petitioner's home looking for Dodson (A-24). Mrs. Jackson was informed by one of the representatives that there was money owing and that he would return the following Monday to collect $30.00, although no mention was made of

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[1] See Plaintiff's In Forma Pauperis Petition and Affidavit filed with and granted by the District Court on October 18, 1971.

the total amount allegedly owing (A-25).[2] However, on that Monday, this representative failed to come, and instead, company workmen came early in the morning to disconnect the electricity at the pole for nonpayment of the bill. (A-25). Thus, Mrs. Jackson's first notice of termination was when she walked out her front door and asked the utility workmen what they were doing. *Id.* Petitioner was not able to reach Respondent's representatives whom she called at the company as well as at home in order to have the service reinstated. (A-25, 26).

Mrs. Jackson received no written or oral notice from the company prior to the termination of her service[3] (A-25, 26), informing her of the termination and reasons therefor, or of opportunities to contest the termination. Significantly, Mrs. Jackson was never even made aware of the exact amount allegedly owing. (A-25).

Petitioner and her children suffered substantial harm as a result of the unexpected termination of her electrical service (A-27). Mrs. Jackson's electricity was shut off for eight days until the district court granted a temporary restraining order on October 18, 1971. (A-13, 14). During this eight day period, Mrs. Jackson

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[2] Although some mention of possible "tampering" was made by the company representative, the Court specifically found no evidence of its applicability to this case (A-89, n. 3).

[3] The Court of Appeals noted that the termination of Petitioner's service did not occur until after she had been "contacted" by two representatives and had been made "aware" of "irregularities" in her account. 483 F.2d at 761. However, the representatives at no time informed her that she was in imminent danger of having her electricity terminated for nonpayment of a bill, the amount of which they never informed her.

and her children had no lighting, no heat[4] and no hot water for bathing or cooking (A-27). As a result of the lack of heat, Mrs. Jackson's children caught colds and had to be taken to the doctor (A-27).

Following the termination of Petitioner's utility service on October 11, 1971, (A-26), and her unsuccessful attempts at reinstatement of service, Petitioner filed suit against Respondent in the United States District Court for the Middle District of Pennsylvania, seeking damages, declaratory and injunctive relief to enjoin Respondent from terminating service for nonpayment of a disputed bill in the absence of notice and opportunity for a hearing concerning the merits of the claim. On October 18, 1971, the Court issued a Temporary Restraining Order, ordering Respondent to reinstate Petitioner's service. On October 22, 1971, following a hearing on issuance of a preliminary injunction, the parties stipulated to an extension of the restraining order pending the District Court's decision (A-33, 34). On November 5, 1971, Respondent filed a Motion to Dismiss (A-64), and on June 30, 1972 the lower court issued its Memorandum and Order dismissing Petitioner's Complaint for lack of subject matter jurisdiction, in that the Court held that the Respondent utility did not act under color of law (A-65, 66).

On July 13, 1972, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit (A-74). The Attorney General of the Commonwealth of Pennsylvania was granted leave to submit a brief amicus curiae in support of the Petitioner's position (A-5). On August 7, 1973 the District Court

[4]Mrs. Jackson used her oven to partially heat her home downstairs.

continued the Temporary Restraining Order pending determination of Petitioner's appeal (A-75). The case was argued before the Court of Appeals on May 4, 1973, and, on August 21, 1973, the Court handed down its Opinion and Judgment affirming the Order of the District Court (A-76, 77). Petitioner moved for a rehearing before the court en banc, and on October 25, 1973, that petition was denied without opinion (A-93). A Petition for Writ of Certiorari was filed with and was then granted by this Court on February 19, 1974 and Petitioner was granted leave to proceed in forma pauperis (A-94).

SUMMARY OF ARGUMENT

I. State Action:

A sifting of the facts and a weighing of the circumstances, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), leads to the conclusion that the Respondent acted under color of state law when it terminated the Petitioner's electrical services for non-payment of a disputed bill.

Metropolitan Edison is a state sanctioned monopoly, permitted by the state to engage in the utility business in an exclusive geographical area, pursuant to a grant of a "certificate of public convenience" by the Commonwealth of Pennsylvania. 66 Pa. Stat. Anno. §1121. As a result of the certificate, the Respondent is placed in a position of favored economic power. Consequently, since its customers have no alternative means of service, the Respondent has little incentive to refrain from arbitrarily terminating service for nonpayment of a disputed bill. Thus, state action has been found to exist when the government places monopoly power in private hands. *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956); *Lathrop v. Donohue*, 367 U.S. 820 (1961).

The supplying of electrical services is traditionally a public function. *Munn v. Illinois*, 94 U.S. 113 (1877). Such electrical services unquestionably constitute a "necessity of life", *Jones v. City of Portland*, 245 U.S. 217 (1917); *Palmer v. Columbia Gas of Ohio*, 479 F.2d 153 (C.A. 6, 1973), as can be seen in the recent newspaper reports of the deaths of elderly persons resulting from the termination of such services. See *The New York Times*, Dec. 26, 1973.

The Public Utility Law establishes a duty upon utilities to provide "reasonably continuous" service in the public interest. 66 Pa. Stat. Anno. §1171. Quite often, the provision of such service is undertaken by governmental bodies directly.

A finding of state action has thus often resulted from the performance of a public function by a "private" entity. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Evans v. Newton*, 382 U.S. 296 (1966). The furnishing of utility services is similarly a public function justifying a finding of state action. *Ihrke v. Northern States Power Company*, 459 F.2d 566, 569 (C.A. 8, 1972), cert. granted, vacated as moot, 34 L.Ed.2d 72 (1972).

In addition, the quasi-judicial function of determining the lawfulness of the deprivation of property under state authority, is another governmental function performed by Respondent, further justifying a finding of action under color of law herein.

Metropolitan Edison further acts in joint participation with the state, under extensive state regulation, in pursuing mutual goals, under a statutory obligation to furnish "reasonably continuous" service, from which mutual benefits are derived. In this regard, the Commonwealth of Pennsylvania is significantly involved in all areas of the Respondent's operations, similar to

the relationship in *Burton v. Wilmington Parking Authority, supra.* Hence, the Pennsylvania Public Utility Commission regulates the setting of utility rates and the furnishing of services; requires all utilities to file tariffs with the Commission and obtain approval thereon; and has general administrative powers and authority, similar to those of a principal to an agent, including the veto power over utility contract provisions. 66 Pa. Stat. Anno. §§1141, 1142, 1171, 1341, 1360.

In pursuing their mutual goals of furnishing "reasonably continuous" electrical services, both the Respondent and the state derive mutual benefits therefrom. The Respondent receives monopoly status, a guaranteed fair rate of return, and rights of eminent domain and entry on private property. 66 Pa. Stat. Anno. §§1121, 1124, 1141, P.U.C. Elec. Reg., Rule 14D. It is additionally granted power to promulgate its own regulations which have the effect of law. 66 Pa. Stat. Anno. §1171; *Cray v. Pa. Greyhound Lines,* 177 Pa. Super 275, 110 A.2d 892 (1955).

In return, the Commonwealth of Pennsylvania is assured that its citizens receive necessary utility services at a reasonable cost. The state additionally benefits from summary terminations which reduce utility costs and hence rates. At the same time, the state benefits from threatened terminations, since disputed bills are then quickly paid, thereby increasing utility revenues in which the state shares. See *Ihrke v. Northern States Power Company,* 459 F.2d at 568. Finally, the Commonwealth of Pennsylvania directly benefits from the receipt of a fixed portion of the Respondent's revenues, through collection of the Utilities Gross Receipts Tax, 72 Pa. Stat. Anno. §8101.

In addition to the above, the Commonwealth of Pennsylvania has specifically authorized and approved

Metropolitan Edison's termination practices. Pursuant to statutory and regulatory authority, 66 Pa. Stat. Anno. §§1122, 1171, P.U.C. Tariff Reg. Section VIII, the Respondent's constitutionally deficient termination tariff was filed with and was approved by the Commission, by becoming automatically effective sixty days after filing. 66 Pa. Stat. Anno. §1148, P.U.C. Tariff Reg., Section II. The Commission's approval, in conjunction with its silence of Metropolitan Edison's termination tariff, thus warrants a finding of state action similar to that in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952); *Palmer v. Columbia Gas of Ohio*, 479 F.2d 153 (C.A. 6, 1973); *Washington Gas Light Co. v. Virginia Electric and Power Co.*, 438 F.2d 248 (C.A. 4, 1971).

Furthermore, the Commonwealth of Pennsylvania has specifically "encouraged" Metropolitan Edison's termination practices. See *Reitman v. Mulkey*, 387 U.S. 369 (1967); *McCabe v. Atchison Topeka and Santa Fe R. Co.*, 235 U.S. 151 (1914). In this case, the Pennsylvania Public Utility Law exempts utilities from the usual requirement of obtaining prior Commission approval for termination of services for nonpayment of a bill. 66 Pa. Stat. Anno. §1122. In addition, the Commission authorizes utilities to promulgate their own termination tariffs, and grants them the right of entry onto customers' premises, which does facilitate the termination procedure. Certainly, because the Respondent has been granted monopoly power, it has little incentive to refrain from arbitrary termination practices.

Finally, the state has delegated to Metropolitan Edison its statutory obligation to assure the provision of "reasonably continuous" services, and has further delegated its responsibility to the public to determine whether termination of service for alleged nonpayment

of bills is in compliance with existing laws and constitutional requirements. This "abdication" of duty, through delegation of authority constitutes state action. *Burton v. Wilmington Parking Authority*, 365 U.S. at 715; See *Fuentes v. Shevin*, 407 U.S. 67 (1972) at 93.

II. Due Process of Law:

Due process of law is necessary to prevent arbitrary and erroneous deprivations of a statutorily conferred entitlement, which, in this case, consists of the Petitioner's statutory right to "reasonably continuous" utility service. Once an entitlement is conferred by the government it cannot be taken away in the absence of due process of law, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970), especially when such entitlement constitutes a necessity of life. *Palmer v. Columbia Gas of Ohio*, supra.

In view of the numerous instances of utility company errors, employee indifference or hostility, arbitrary utility company termination practices, the availability of legitimate customer defenses and the lack of adequate administrative and legal remedies available to low income consumers, it is readily apparent that the protections of adequate prior notice and opportunity to be heard must be provided to a customer before being deprived of essential utility services. It is submitted that "the stakes are simply too high" to permit unfettered termination practices. *Goldberg v. Kelly*, 397 U.S. at 266.

Since the receipt of continued utility service is a protected property interest, *Board of Regents v. Roth*, 408 U.S. 564 (1972), due process of law in utility termination situations requires adequate prior notice of the nature of the dispute, means of resolution of the dispute and of the right to an oral evidentiary hearing,

prior to the termination of utility services. *Palmer v. Columbia Gas of Ohio*, 479 F.2d at 166; *Bronson v. Consolidated Edison of New York*, 350 F.Supp. 443, 450 (S.D.N.Y., 1972). The customer may be afforded the opportunity for a conference with a company representative and an informal agency hearing, prior to the opportunity for a formal oral hearing.

The remedy of "pay first and litigate later", sanctioned by the Court of Appeals (A-91), is in actuality a "non-alternative", *Bronson*, supra at 449, and is contrary to the teaching of this Court that a wrong will not be permitted to be done merely because it might be undone. *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

ARGUMENT

I.

RESPONDENT ACTS UNDER COLOR OF STATE LAW WHEN IT TERMINATES PETITIONER'S ELECTRICAL SERVICES FOR NONPAYMENT OF A DISPUTED BILL.

A finding of action under color of state law requires a comprehensive analysis of the cumulative effects of the various state action indices that are involved in the facts of each particular case.

> "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

See also *Moose Lodge 107 v. Irvis*, 407 U.S. 163 (1972).

Petitioner submits that a sifting and weighing of the facts and circumstances in this case can lead only to the

conclusion that the Respondent did act under color of law when it terminated Petitioner's electrical services.

A. Respondent is a state sanctioned monopoly which performs a public function and which acts in joint participation with the state under extensive state regulation.

1. *Respondent is a state sanctioned monopoly, placed by the state in a position of favored economic power.*

In Pennsylvania, public utility companies may not engage in business unless a "certificate of public convenience" is conferred upon them by the Pa. Public Utility Commission. 66 Pa. Stat. Anno. §§1121, 1122. Such a certificate may be granted only following a determination by the Commission that the granting of same is necessary or proper for the service, accommodation, convenience or safety of the public. *Id*, §1123. The certificate of convenience sets forth the description of the service and the exclusive territorial limitations of such service. *Id*, §1121.

The granting of a certificate of convenience or exclusive franchise represents a fundamental restructuring of a private anti-competitive market to one under governmental control.[5] It is apparent that such state authorized monopoly status results in the

[5] As commerce developed in medieval England, artificial monopolies tended to disappear, leaving only the "natural monopolies", which by their nature, would not admit of free competition, such as water, gas, telephone and electric companies." Burdick, "The Origin of the Peculiar Duties of Public Service Companies", 11 Columbia L.R. 514 (1911). Because people were "compelled" to resort to these natural monopolies, to obtain a "necessity" such as fuel, "which could otherwise be obtained with great difficulty and at times perhaps not at all", *Jones v. City of*

enjoyment by the utility of a favored economic position.[6] As a result of the lack of competition, the utility customer is afforded little bargaining power,[7] and consequently the utility has little incentive to refrain from terminating service for nonpayment of a disputed bill.[8] Thus, the utility company may elect to terminate a customer's services knowing that the "power, property and prestige" of the state is behind

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Portland, 245 U.S. 217, 224 (1917), the states found it necessary to control the potential evil of "odius" common law monopolies, *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 526, 534 (1858), in the "public interest", *Munn v. Illinois*, 94 U.S. 113 (1877); *Nebbia v. New York*, 291 U.S. 502 (1934), Wyman, "The Law of Public Callings as a Solution to the Trust Problem", 17 Harvard L.Rev. 156 (1904); Arterburn, "The Origin and First Test of Public Callings," 75 U. Pa. L.Rev. 411 (1927).

[6] It is interesting to note that the successful attempts of public utilities to exclude themselves from the anti-trust laws have not been on the grounds that they are not monopolies, but rather on the basis that their monopoly activity constitutes "state action". See *Gas Light Co. of Columbus v. Georgia Power Co.*, 440 F.2d 1135 (C.A. 5, 1971) cert. den., 405 U.S. 969 (1972) (state action due to "intimate involvement" of state in defendant's rate making process), and *Washington Gas Light Co. v. Virginia Electric and Power Co.*, 438 F.2d 248 (C.A. 4, 1971) (state silence constituting "approval" of utility's activities).

[7] The dangers of unfettered termination are great, for as this court recently observed "[if a creditor] knows that he is dealing with uneducated, uninformed consumers with little access to legal help and familiarity with legal procedures, there may be a substantial possibility that a summary seizure of property - however unwarranted - may go unchallenged and the [creditor] may feel that he may act with impunity." *Fuentes v. Shevin*, 407 U.S. 67 (1972), at 83, n. 13.

[8] *Wood v. City of Auburn*, 87 Me. 287, 32A. 906 (1895).

such action. *Burton v. Wilmington Parking Authority*, 365 U.S. at 725.

It is not surprising therefore that state action has been found to exist in situations where the government places monopoly power in the private hands. *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956); *Lavoi v. Bigwood*, 457 F.2d 7 (C.A. 1, 1972).

2. *Respondent performs an important public function in supplying essential electrical services.*

The supplying of electrical services, often undertaken directly by governmental bodies, is a public function, particularly in view of the fact that the provision of utility service has always been regarded as a "public calling."[9] Thus, as stated by one in its analysis of this issue:

"It is, of course, fundamental that justification for the grant by a state to a private corporation of a

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[9]See Note: "Constitutional Safeguards for Public Utility Customers", 48 NYU L.Rev. 493 (1973); Wyman, *Public Service Corporations* (1911). Thus, when private property is "affected with a public interest, it ceases to be *juris privati* only" and becomes clothed with a public interest when it is used in a manner to make it of "public consequence to the community at large." *Munn v. Illinois*, 94 U.S. at 126, quoting from Hale, *De Portibus Maris*, 1 Harg. Law Tracts 78. (emphasis original). However, when such functions are performed by private parties they become subject to governmental regulation. Barnes, "Governmental Regulation of Public Service Corporations," 3 Marquette L. Rev. 65 (1918). Furthermore, it is immaterial that the business was established prior to imposition of the state regulatory control. *Munn v. Illinois*, 94 U.S. at 133. The important issue is the "type" of service being provided, rather than whether a public or private entity actually furnishes the service. *Jones v. City of Portland*, 245 U.S. at 233. See also *Moody's Public Utility Manual*, §38 (1972).

> right or franchise to perform such a public utility service, as furnishing transportation, gas, electricity or the like, on the public streets of the city, is that the grantee is about the public's business. It is doing something the state deems useful for the public necessity or convenience." *Boman v. Birmingham Transit Co.*, 280 F.2d 531, 535 (C.A. 5, 1960).[10]

There can be little doubt that in furnishing utility services, public utilities provide a "necessary service" that is beneficial to the public. Note, supra, 48 N.Y.U.L.Rev. at 507. Thus, in *Jones v. City of Portland*, 245 U.S. 217, (1917) at 223-225, this Court recognized that fuel constituted an "indispensible necessity of life" whose absence would endanger the community as a whole, because "heat is as indispensible to the health and comfort of the people as is light or water." Also see *Moose Lodge 107 v. Irvis*, 407 U.S. at 173 in this regard.

Most courts that have addressed themselves to the issue have found continued utility services to constitute a necessity of life. Thus, in *Bronson v. Consolidated Edison Co. of New York*, 350 F.Supp. 443 (S.D.N.Y., 1972) at 447 the court found "beyond doubt" that electric service can become "vital to the existence",

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[10]Courts have specifically noted that furnishing of utility service was a public function and therefore constituted an important index of state action. See *Bronson v. Consolidated Edison of New York*, 350 F.Supp. 443 (S.D.N.Y., 1972); *Stanford v. Gas Service Co.*, 346 F.Supp. 717 (D., Kan., 1972); *Davis v. Weir*, 328 F.Supp. 317, 359 F.Supp. 1023 (N.D., Ga., 1971, 1973); *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (C.A. 6, 1973); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (C.A. 8, 1972) *cert. granted, vacated as moot*, 34 L.Ed. 2d 72 (1972).

while the court in *Stanford v. Gas Service Co.*, 346 F.Supp. 717 (D., Kan., 1972) at 720 noted that "unheated shelter affects life itself."[11] Similarly, the district court in *Palmer v. Columbia Gas of Ohio*, 342 F.Supp. 241 (N.D., Ohio, W.D., 1972) at 247, stated that the lack of heat in the winter time has "very serious effects upon the physical health of human beings, and can easily be fatal." In like manner the court in *Davis v. Weir*, 328 F.Supp. 317, 359 F.Supp. 1023 (N.D., Ga., 1971, 1973) at 322, found that a tenant would "suffer a serious loss" without the benefit of water services which constituted a necessity. See also *Palmer v. Columbia Gas of Ohio*, 479 F.2d 153 (C.A. 6, 1973) at 168, and *Wood v. City of Auburn*, 87 Me. at 292.[12]

The common law duty to furnish adequate utility service at a fair price was incorporated into state public utility laws.[13] Thus, the Pennsylvania Public Utility

[11]In this regard, in noting electrical service to be a necessity of life, one has to look no further than the evening newspaper for shocking articles reporting the deaths of families and of elderly persons whose utility services had been terminated during the Winter of 1973. See "Tragedies: A Winter's Tale", *Newsweek*, p. 28 (Jan. 8, 1974), and "Man, Seventy-one Freezes to Death After Utility Shuts Off Gas", United Press International, appearing in *Boston Globe*, p. 17 (Feb. 9, 1974).

[12]The above characterizations of utility service as a necessity of life are in sharp contrast to the casual observation of the Third Circuit that the absence of such service does not pose a "threat" to the life of the occupants, and that such service constitutes a convenience, rather than a necessity in urban life. (A-88).

[13]At common law, "a person by holding himself out to serve the public, generally assumed two obligations - to serve all who applied; and if he entered upon the performance of the service, to do it in a workmanlike manner." Burdick, supra, note 5 at

Law, 66 Pa. Stat. Anno. §1101, et seq., imposes a duty on all public utilities to provide "reasonably continuous" service at a fair price to all customers.[14] *Id.* §§1141, 1171. Such an obligation is inherent in every certificate of public convenience, and hence, a public service corporation may not operate only "when the weather is pleasant" or when there is a "chance for profit." *Columbo v. Pa. P.U.C.*, 159 Pa. Super. 483, 48 A.2d 59 (1946). Similarly, the Commonwealth of Pennsylvania, through its Public Utility Commission, has a statutory duty to assure that public utilities furnish "reasonably continuous" service, 66 Pa. Stat. Anno. §§452, 1171, 1341.[15]

It is precisely because a public utility acts in the public interest in supplying essential utility services

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158. Also see Wyman, supra, note 5 at 166, where it is stated that "the situation demands this law, that all who apply shall be served, with adequate facilities for reasonable compensation and without discrimination; otherwise in crucial instances of oppression, inconvenience, extortion and injustice there will be no remedies for those industrial wrongs."

[14]The statutory obligation to supply service to all applicants is one of the main factors to be considered in distinguishing this case from that of *Columbia Broadcasting System v. Democratic National Committee*, 36 L.Ed.2d 772 (1973). In the *CBS* case at least three members of this Court failed to find governmental action in the refusal of a broadcaster to accept a paid editorial advertisement, primarily because of the Congressional intent expressed in the Federal Communications Act that broadcast licensees were not to be treated as common carriers and were not obligated to accept whatever is tendered by members of the public.

[15]Such an obligation consists of the "primary duty" to protect the interests of utility customers, as the "primary object" of the public service laws is at all times to serve the public. *Ridley Township v. Pa. P.U.C., 172 Pa.* Super. 472, 94 A.2d 168 (1953).

under the authority of the Public Utility Law, that it cannot be permitted to terminate such services without due process protections to the customer. Hence, the failure of certain courts to find state action primarily because the utility was deemed by them to be "motivated by purely private economic interests" and pursuant to its "own regulations" in terminating customers' services,[16] is based upon the erroneous premise that a public utility is legally permitted to act solely pursuant to its own private interests, as compared to also being required to act in the public interest. See Sprecher J., dissenting in *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638 (C.A. 7, 1972) cert. den. 34 L.Ed.2d 696 (1973).

Since this Court has numerous times held that a private organization exercising significant control over the operation, management or supply of a governmental or public service acts under color of law,[17] a finding of

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[16]*Kadlec v. Illinois Bell Telephone Co.*, 407 F.2d 624 (C.A. 7, 1969), cert. den. 396 U.S. 846 (1969); (however, see Kerner J. Concurring); *Taglianetti v. New England Tel. and Tel. Co.*, 81 R.I. 351, 103 A.2d 67 (1954); *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638 (C.A. 7, 1972) cert. den. 34 L.Ed.2d 696 (1973) (however, see Sprecher, J. dissenting); *Particular Cleaners v. Commonwealth Edison Co.*, 457 F.2d 189 (C.A. 7, 1972) cert. den. 34 L.Ed.2d 148 (1972); Also see *Martin v. Pacific Northwest Bell Tel. Co.*, 441 F.2d 116 (C.A. 9, 1971).

[17]*Nixon v. Condon*, 286 U.S. 73 (1932); *Terry v. Adams*, 345 U.S. 461 (1953) (running of elections); *Marsh v. Alabama*, 326 U.S. 501 (1946) (operating a company town); *Evans v. Newton*, 382 U.S. 296 (1966) (maintaining a municipal park); *Cooper v. Aaron*, 358 U.S. 1 (1958) (providing free education); and *Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968) (shopping center); *Smith v. Allwright*, 321 U.S. 649 (1944). Also see *Hampton v. City of Jacksonville*, 304 F.2d 320 (C.A. 5, 1962); *Farmer v. Moses*, 232 F.Supp. 154 (S.D.N.Y., 1964) (state fair); *Baldwin v. Morgan*, 287 F.2d 750 (C.A. 5, 1961); *McQueen v. Drucker*, 438 F.2d 781 (C.A. 1, 1971) (public housing); *Meredith v. Allen County War Memorial Hospital Commission*, 397 F.2d 33 (C.A. 6, 1968) (hospital); and *Smith v. Holiday Inns of America*, 336 F.2d 630 (C.A. 6, 1964) (hotel).

state action is similarly compelled in the instant case, where the Respondent is under a statutory obligation to furnish a service which is necessary to life.[18] In performing this and other public functions,[19] Metropolitan Edison thus acts under color of state law.

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[18]The performance of a public function in supplying necessary utility services was found to be an important index for a finding of state action in *Bronson v. Consolidated Edison of New York*, supra; *Stanford v. Gas Service Co.*, supra; *Davis v. Weir*, supra; *Palmer v. Columbia Gas of Ohio*, supra; and *Ihrke v. Northern States Power Co.*, supra.

[19] In addition to the performance of a public function in supplying utility service, the Respondent has also been authorized by the state to perform a governmental function in the adjudication of when private property is to be seized; and then itself is permitted to carry out that seizure and state sanctioned deprivation of property. Thus, courts have often held that statutorily authorized actions by a private person, resulting in the seizure or deprivation of property interests, which action possesses the characteristics of an act by the State, constitutes state action. Such action may take the form of entry onto private property, as the summary seizure of tenants' property by landlord: *Hall v. Garson*, 430 F.2d 430 (C.A. 5, 1970); *Dielen v. Levine*, 344 F.Supp. 823 (D., Neb., 1972); *Gross v. Fox*, 349 F.Supp. 1164 (E.D., Pa., 1972); or summary seizure of property by an innkeeper: *Klim v. Jones*, 315 F.Supp. 109 (N.D., Cal., 1970); or detention of an automobile by a garageman: *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (C.A. 2, 1973); *Mason v. Garris*, 360 F.Supp. 420 (N.D., Ga., 1973), or service of court process by private persons: *United States v. Wiseman*, 445 F.2d 792 (C.A. 2, 1971); or the arrest of persons by a bail bondsman: *Hill v. Toll*, 320 F.Supp. 185 (E.D., Pa., 1970). Hence, it is the delegation by the state to a private party of the decision making process to carry out the seizure of the property of another, following a contractual dispute, that has resulted in a finding of action under color of law. *Fuentes v. Shevin*, 407 U.S. 67 (1972). Thus, when a private party is

3. *Respondent acts in joint participation with the state, under extensive state regulation, in pursuing mutual goals under a statutory obligation to furnish "reasonably continuous" electrical services, from which mutual benefits are derived.*

Since both the Respondent and the Commonwealth of Pennsylvania have the mutual goals and mutual obligations of furnishing "reasonably continuous" utility services at a fair price to the utility customers, 66 Pa. Stat. Anno. §§1141, 1171, it is submitted that the Commonwealth of Pennsylvania is no less involved in Metropolitan Edison's activities than was the State of Delaware, when it was held to be a joint participant for state action purposes in the restaurant business in *Burton v. Wilmington Parking Authority*, 365 U.S. at 724.[20]

In pursuing their mutual goals, it is also apparent that the Commonwealth of Pennsylvania is "significantly involved" in every aspect of Metropolitan Edison's operations and activities. The Commonwealth of Pennsylvania, through its Public Utility Commission,

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enabled by the state to deprive others of due process of law, a finding of state action is compelled, since the state has provided that method for resolution of such disputes. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

[20]In determining whether state action existed based in part upon joint participation in a particular activity, this Court has noted that the actor need not be an "officer" of the state, since it is enough if he is a "willful participant" with the state. *United States v. Price*, 383 U.S. 787 (1966) at 794. Furthermore, the involvement of the state need not be "either exclusive or direct", since state action can be found even though the participation of the state is "peripheral" or its action is only one of "several cooperative forces" resulting in the constitutional violations. *United States v. Guest*, 383 U.S. 745 (1966).

extensively regulates and controls Metropolitan Edison by first granting it a "certificate of public convenience" in order for it to operate. 66 Pa. Stat. Anno. §§1121-1123. The Commission further controls the setting of rates by all utilities. *Id*, §1141. Every public utility must file its tariffs with the Commission. *Id*, §1142. Furthermore, no public utility may subject any customer to any "unreasonable prejudice or disadvantage" as to rates, *Id*, §1144. Of major importance is the fact that the Commission has complete power over the character of utility facilities and the furnishing of service by the utilities. *Id*, §1171. In addition, no public utility may subject any customer to any unreasonable prejudice or disadvantage in the furnishing of service. *Id*, §1172, and the Commission may further require reasonable standards for service. *Id*, §1182, upon its own motion or upon any complaint of "unreasonable, unsafe, inadequate, insufficient or unreasonably discriminatory" service. 66 Pa. Stat. Anno. §1183.[21]

The Commission has general administrative power and authority to "supervise and regulate" all public utilities doing business within the Commonwealth. 66

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[21] In addition to its regulatory control over rates and services, the Commission has extensive regulatory and supervisory powers over utility operations, accounting and budgetary matters, 66 Pa. Stat. Anno. §1211, and, at all times has access to and may inspect and examine all utility accounts, books, maps, inventories, appraisals, valuations or other reports, documents and memoranda, and may require the filing of such material with the Commission. *Id*, §1217. The Commission also has supervision over utility securities and obligations. *Id*, §1241, and additionally has power to control a utility's relations with affiliated interests. *Id*, §§1271, 1276.

Pa. Stat. Anno. §1342.[22] In fact, the Commission's relationship with and control over utility companies is strikingly similar to that of a principal and agent relationship.[23]

It is apparent from the above that Metropolitan Edison is not a typical private business entity, since, in addition to state licensing, every significant aspect of its operation is subject to comprehensive statutory and administrative regulation. This comprehensive regulatory scheme demonstrates the complete involvement of the state in and its joint participation with the Respondent

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[22]In this regard, it is interesting to note that the Court's finding of state action in *Stanford v. Gas Service Co.*, 346 F.Supp. at 721, was based primarily on the fact the utility was subject to extensive regulatory control, based on a Kansas statute, pursuant to which the utility terminated its customer's service. That statute was very similar to Section 1341 above, and provided:

> "Power, Authority and Jurisdiction. The state corporation commission is given full power, authority and jurisdiction to supervise and control the public utilities . . . and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." K.S.A. §66-101.

[23]The Commission is further vested with the power to enforce all of the provisions of the Act, including the "full intent thereof", and to "rescind" or "modify" any regulations or orders. 66 Pa. Stat. Anno. §1342. The filing of reports may be required of utilities. Id, §1345, and they are likewise required to observe and obey all regulations and orders of the Commission. Id, §1347. Further, the Commission is empowered to "vary, reform or revise" the terms of any contract entered into by utilities which concerns the "public interest and the general well being" of the Commonwealth. Id, §1360. Finally, the Commission is empowered to hear, investigate and resolve all complaints on behalf of or against any public utility in violation of any law which the Commission has jurisdiction to administer. Id, §§1391, 1395, 1398.

in the supplying of electrical services.[24] The Pennsylvania regulatory scheme thus goes far beyond the simple notice filing requirement which was found insufficient for state action purposes in *Kadlec v. Illinois Bell Telephone Company*, 407 F.2d 624 (C.A. 7, 1969) cert. den. 396 U.S. 846 (1969).[25]

In addition to the partnership role of the Respondent and the state in the furnishing of essential electrical services, mutual benefits are conferred upon these joint venturers through the provision of such services. Similarly, the finding of state action through joint participation in *Burton v. Wilmington Parking Authority*, supra, was based in part upon the fact that benefits were mutually conferred upon the state and the private entity in furnishing of the challenged service.

Metropolitan Edison receives distinct benefits from this arrangement since it is granted a certificate of convenience or franchise, and monopoly from the state. 66 Pa. Stat. Anno. §1121, in an exclusive territory of service. *Id*, §1121, with a guaranteed fair rate of return, *Id*, §§1141, 1171; *City of Pittsburgh v. Pa. P.U.C.*, 182 Pa. Super. 551, 128 A.2d 372 (1957), and is further vested with the right of eminent domain, *Id*,

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[24]While the concept of "pervasive state regulation" was not deemed to itself constitute the major indicia of state action by this Court in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952) and in *Moose Lodge 107 v. Irvis*, 407 U.S. 163 (1972), yet its significance apparently cannot be underestimated in light of this Court's statement in *Columbia Broadcasting System v. Democratic National Committee*, 36 L.Ed.2d 772 (1973) at 793 that Congress did not establish a regulatory scheme for broadcast licensees "as pervasive as the regulation of public transportation in *Pollak*."

[25]If the utility company is to be given extensive powers in conjunction with its public responsibilities, it must be remem-

§1124, and the right of entry onto customers' private property for the purpose of maintenance and operation of its equipment, Pa. P.U.C. Electric Regulation, Rule 14D. Finally, the Respondent is authorized by statute to promulgate its own regulations which have the effect of law, *Cray v. Pa. Greyhound Lines*, 177 Pa. Super. 275, 110 A.2d 892 (1955), and which are subject only to the restraints of state laws. *Id.* §1171.

Likewise, certain substantial benefits are conferred upon the Commonwealth of Pennsylvania, through the furnishing of utility service by the Respondent. The state is assured that its citizens will receive reasonably continuous and necessary utility services at reasonable prices through provision of such services by public utility companies. Furthermore, the state has an interest in seeing to it that its citizens receive such services at the lowest possible rate, while still yielding a fair rate of return to the utility. Furthermore, the control of rates to the public is another major benefit derived by the state from utility regulation. Since relatively unfettered terminations reduce the utility's operating costs, and since this reduction would be reflected in lower rates, the termination of services serves to further the state's regulatory interests.[26] The state thereby

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bered that "Along with power, goes responsibility," and thus, when the actor's authority is derived in part from the "Government's thumb on the scales", the exercise of such authority and power becomes "closely akin to its exercise by the Government itself." *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

[26]See, Note: "Fourteenth Amendment Due Process in Terminations of Utility Services for Nonpayment," 86 Harvard L.Rev. 1477 (1973).

ironically receives a direct pecuniary benefit from the specific act complained of.

In addition, since the utility is a monopoly, its threat of termination for nonpayment of a bill has a tremendously coercive impact and often results in immediate payment of many disputed bills. Since the threatened terminations can result in an increase of revenue, and since the state receives a share of the utility's gross revenues, pursuant to 72 Pa. Stat. Anno. §8101, such threatened terminations result in a direct benefit to the state.[27]

Finally, it is apparent that the Commonwealth of Pennsylvania has a direct financial interest in the revenue of the Respondent. Although the Respondent corporation pays corporate net income tax and capital or franchise tax and property taxes, as do other Pennsylvania corporations, it also pays an additional and unique tax, i.e., the Utilities Gross Receipts Tax, 72 Pa. Stat. Anno. §8101, et seq. Every public utility, including Respondent, must pay to the Commonwealth of Pennsylvania, a tax of forty-five mills upon each dollar of its gross receipts from the sale of its utility services, including electricity. 72 Pa. Stat. Anno. §8101. It is submitted that the Utilities Gross Receipts Tax is no different than the five percent of gross profits paid to the City of St. Paul by the Northern States Power company in *Ihrke v. Northern States Power Co.*, supra. As in *Ihrke*, such an "arrangement" makes the state a "direct beneficiary" of the utility's business, especially since the state had the power to set the

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[27]This rationale was specifically adopted by the Eighth Circuit as a basis for its finding of state action in *Ihrke v. Northern States Power Co.*, supra, 459 F.2d at 568.

utility's rates and to regulate its operations. *Ihrke*, supra, 459 F.2d at 570.[28]

Therefore, whether or not the Respondent intended to be a "partner" in furnishing utility services with the Commonwealth, is immaterial. It is sufficient for state action purposes that the two entities operate in a "symbiotic relationship", *Moose Lodge 107 v. Irvis*, 407 U.S. at 166, in the provision of such services.[29]

B. The Commonwealth of Pennsylvania is directly involved in the Respondent's termination activities in that it has specifically authorized, encouraged and approved such activities, and it has delegated its statutory obligation to the Respondent to determine the lawfulness of its own challenged termination practices.

1. *The Commonwealth of Pennsylvania has specifically authorized and approved the Respondent's termination action.*

A finding of state action is compelled when the state regulatory agency specifically approves the utility's

[28]See also *Hattell v. Public Service Co. of Colorado*, 350 F.Supp. 240 (D., Colo., 1972); *Buffington v. Gas Service Co.*, -F.Supp.- (W.D., Mo., W.D. 1973); *Salisbury v. New England Tel. and Tel. Col*, 2 Poverty Law Rep. §18546 (D., Conn., 1973) where the states derived specific monetary benefits from the utility's activities.

[29]States have been found to be joint participants for state action purposes in other utility termination cases. See *Buffington v. Gas Service Co.* - F.Supp. - (W.D., Mo., W.D., 1973) (City of Kansas shared "directly and proportionately" in the gross revenue of the defendant utility); *Bronson v. Consolidated Edison of New York*, 350 F.Supp. at 446 (the "utility is licensed to and does act as an agent of the state"); *Palmer v. Columbia Gas of Ohio*, 479 F.2d at 165 ("the regulatory activities of the state have insinuated it into a position of interdependence with the company so that it must be recognized as a joint participant with the company"). Also see *Ihrke v. Northern States Power Co.*, 459 F.2d at 569.

challenged conduct. *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952).

The Court of Appeals held that Metropolitan Edison's termination procedure is merely the product of internal corporate action without acquiescence of or authorization by the Commonwealth of Pennsylvania.[30]

However, Tariff Reg. No. VIII, is not the only state regulation to be considered here, for the Court has overlooked specific statutory authorization for the challenged practice. The Public Utility Code, 66 Pa. Stat. Anno. §1171 states *inter alia*:

> "Subject to the provisions of this act and the regulations or orders of the [Public Utility] Commission, every public utility may have *reasonable* rules and regulations governing the conditions under which it shall be required to render service . . ." (emphasis added).

Together with filing requirements of Tariff Reg. No. VIII, this statute subjects utility regulations governing conditions of service and termination to the regulatory authority of the Public Utility Commission. It requires the utility to adopt regulations acceptable to and to be approved by the Commission. It mandates a statutory standard of reasonableness. It subjects the corporation's regulations to the enforcement and compliance authority of the Commission. 66 Pa. Stat. Anno. §§1341, 1342, 1343, 1347.

Pursuant to Section 1171, Metropolitan Edison has promulgated Electric Tariff No. 41 which provides

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[30]The only state involvement found by the court was Public Utility Commission regulation, Tariff Reg. No. VIII, which requires utility corporations to set forth the conditions of service termination for non-payment of accounts. This requirement, the court ruled, is not sufficient state involvement to satisfy the state action requirement. 483 F.2d at 758 (A-85).

unchecked authority to terminate utility service for alleged nonpayment of a bill. This tariff has been formally presented to the Public Utility Commission under its requirements governing submission of proposed tariffs. Tariff Reg. No. II. It has been accepted and approved by the Commission under its general regulatory authority. 66 Pa. Stat. Anno. §§1341, 1348. In the absence of Commission disapproval, the Public Utility Law provides that tariffs filed with the Commission will automatically become effective, upon notice, sixty days after filing. 66 Pa. Stat. Anno. §1348; Pa. P.U.C. Tariff Regulations, Section II, "Public Notice of Tariff Changes". In the instant case, Metropolitan Edison filed its termination tariff on April 30, 1971, and it became effective on June 30, 1971. Metropolitan Edison Company Electric Tariff, Electric Pa. P.U.C. No. 41, Rule 15.

It is evident that Section 1171 directly and significantly involves the Commonwealth with the challenged practices. The statutory provision goes far beyond the simple notice-filing requirement of Tariff Reg. No. VIII, cited by the Circuit Court. The Public Utility Commission is to define the standard of reasonableness; it is to review proposed regulations; it is to accept or reject those regulations. And having required, reviewed, accepted, and approved the challenged tariff, the Commission has vested Tariff No. 41 with the apparent authority of the Commonwealth and clothed the termination practice with the legitimacy of law. In short, the state has directly approved Metropolitan Edison's exercise of the tariff provisions. *Public Utilities Commission v. Pollak*, 343 U.S. at 462.

Moreover, Tariff No. 41 carries the force and effect of law. *Cray v. Pa. Grayhound Lines*, 177 Pa. Super. 275, 110 A.2d 892 (1955). Having been submitted,

received and approved by the Commission, the tariff is clothed with an authority which could not otherwise be enforced.[31] Therefore, Metropolitan Edison's tariff is no less an index of specific authorization than was the termination statute in *Palmer v. Columbia Gas of Ohio*, 479 F.2d at 162.

The fact that the Commission may not have held formal hearings to approve or ratify the Respondent's tariff is not material in view of the fact that such tariff was submitted as required by law and was not disapproved,[32] even though the Commission had the power to do so.[33] If Respondent's tariff did not carry

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[31]Significantly, although there was no statutory or regulatory authorization in *Ihrke v. Northern States Power Co.*, 459 F.2d at 570, the court found specific municipal authorization for such activity by the fact that the city had a right to "review and revise" all of the company's proposed regulations.

[32]The Commission's silence on the matter constitutes its consent. Hence, in *Washington Gas Light Co. v. Virginia Electric and Power Co.*, the court stated that:

> "The argument [lack of investigation or formal approval] is not without merit, but the conclusion is not inevitable unless one equates administrative silence with abandonment of administrative duty. It is just as sensible to infer that silence means consent, i.e., approval. Indeed the latter inference seems the more likely one when we remember that even the gas company concedes that the S.C.C. possessed adequate regulatory power to stop V.E.P.C.O. if it chose to do so . . ." 438 F.2d at 252.

[33]Since the Commission had the "right to control" the Respondent's challenged activity, its failure to exercise such power is immaterial for a finding of state action. *Pendrell v. Chatham College*, 42 L.W. 2429 (W.D., Pa., 1974). Such reservation of the power to control operations was specifically noted by the court in *Palmer*, supra, 479 F.2d at 164, as an important index of state action. Significantly, although no statutory or regulatory authorization for termination existed in *Ihrke v. Northern States Power Co.*, supra, 459 F.2d at 570, the court found specific municipal authorization of such activity in

the approval and authority of the Commission, it would have no force and effect and could not serve as justificiation for Metropolitan Edison's termination practices.[34]

2. *The Commonwealth of Pennsylvania has specifically encouraged the Respondent's termination practices.*

In *Reitman v. Mulkey*, 387 U.S. 369, 386 (1967), this Court concluded that prohibited state involvement could be found even where the state can be charged with only "encouraging", rather than "commanding" discrimination. Thus, where the offending party can legitimately rely on a state statute which authorizes or permits the challenged conduct, whether or not such conduct could have been engaged in prior to enactment of the statute, a finding of action under color of law is justified. See *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956); *McCabe v. Atchison Topeka & Santa Fe R. Co.*, 235 U.S. 151 (1914); *Nixon v. Condon*, 286 U.S. 73 (1932).

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the fact that while the company had the right to prepare its own regulations, the City had the right to review and revise all of the company's regulations.

[34]Since Respondent operates solely under the authority of the Public Utility Law, 66 Pa. Stat. Anno. §1171 et seq, any argument that utilities could lawfully terminate services arbitrarily at common law is irrelevant and must be rejected. *Palmer v. Columbia Gas Co. of Ohio*, 479 F.2d at 162. Also see *Reitman v. Mulkey*, 387 U.S. 369 (1967); *New York Times v. Sullivan*, 376 U.S. 245 (1964). Furthermore, any such historically state sanctioned activity would in itself be considered state action since it was undertaken pursuant to state "custom or usage" within the purview of 42 U.S.C. §1983. See *Adickes v. S.H.Kress Co.*, 398 U.S. 144 (1970).

In addition to Commission approval of Metropolitan Edison's termination practices, the Pennsylvania statutory and regulatory scheme also encourages such termination action. The Legislature has thus provided that there be prior Commission approval, including a finding of "compliance with existing laws", for a variety of utility actions, including abandonment or termination of services. 66 Pa. Stat. Anno. §1122. However, at the same time, the Legislature also specifically exempted termination for nonpayment of a bill from the requirement of obtaining prior Commission approval and finding of compliance with the law, needed for almost all other utility company activities. *Id.* §1122(d).

In further encouragement of Respondent's termination practices, the Commission has promulgated several regulations regarding entry on private property and discontinuance of service. Thus, Pa. P.U.C. Electric Regulations, Rule 14D provides that utility personnel may have access to meters and equipment located in customers' premises. In addition, Pa. P.U.C. Tariff Regulations, Section VIII, provides that all public utilities that "impose penalties upon its customers for failure to pay bills promptly shall provide in its posted and filed tariffs a rule setting forth clearly the circumstances and conditions in which the penalties are imposed . . ." Accordingly, the Respondent filed its tariff regarding termination of service with the Commission, as Metropolitan Edison Company Electric Tariff, Electric Pa. P.U.C. No. 41, Rule 15, pursuant to which it terminated Petitioner's electrical service.[35]

[35]Courts have found state action where public utilities were directly encouraged or authorized by state statutory or regulatory schemes to terminate utility services for nonpayment of bills. See *Bronson v. Consolidated Edison Co. of New York, Inc.*, supra; *Buffington v. Gas Service Co.*, supra; *Stanford v. Gas Service Co.*, supra.

Thus, the state has specifically "fostered and encouraged" the activity challenged herein.

In addition to the specific authorization for and encouragement of Respondent's practice challenged above, the Commonwealth has lent further affirmative support to Respondent's activity by assuring Respondent a monopoly in the provision of such services, thereby providing a further disincentive to Respondent to refrain from terminating services for nonpayment of a disputed bill.

3. *The Commonwealth of Pennsylvania has delegated to Respondent the Public Utility Commission's statutory responsibility to assure that customers are not arbitrarily and unlawfully deprived of "reasonably continuous" electrical services.*

The Commission has the duty to see to it that utility customers receive reasonably continuous service, without unreasonable interruptions or delay, 66 Pa. Stat. Anno. §§1171, 1182, 1183, 1341, as part of its primary obligation of protecting the rights and interests of the public. However, both the Legislature and the Commission have delegated such responsibility, by promulgation of Tariff VIII, and Section 1122, 66 Pa. Stat. Anno. §1122, and have thereby transferred such responsibility to the Respondent.

Not only has the Commission delegated its statutory responsibility, but it has also specifically refused to promulgate additional rules and regulations regarding utility company collection and termination practices.[36]

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[36] The petitions of several low income consumers (including that of the Petitioner) filed with the Commission, requesting statewide rule making hearings on the issue of whether opportunity for a prior hearing should be required prior to termination of services for nonpayment of a disputed bill, were recently dismissed by the Commission on March 20, 1974, at Complaint Docket No. C.20089.

By thus approving the Respondent's termination of service tariff, the Commission has authorized the Respondent to determine the reasonableness of its own termination actions. Such abdication of responsibility cannot conceivably be in furtherance of the Commission's duty to "protect the public". *Citizens Water Co. of Washington, Pa. v. Pa. P.U.C.*, 181 Pa. Super 301, 124 A.2d 123 (1956).

It is submitted that the situation in the instant case is very similar to the situation in *Boman v. Birmingham Transit Co.*, supra. It was held by the Fifth Circuit therein that:

> "Where, as here, the City delegated to its franchise holder power to make rules for seating of passengers and made the violation of such rules criminal . . . we conclude that the Bus Company to that extent became an agent for the State, and its actions in promulgating and enforcing the rule constitutes a denial of the Plaintiff's constitutional rights." Id, 280 F.2d at 535.[37]

This Court has held that state "inaction" may be a significant indicia of state action. Hence, in *Burton v. Wilmington Parking Authority*, supra, this Court noted that:

> ". . . the Authority could have affirmatively required Eagle to discharge the responsibilities under the

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[37]It is apparent that the sole distinction between the instant case and *Boman* is that the Respondent's termination rule is not enforceable by criminal sanctions. However, Petitioner submits that this is, in effect, a distinction without a difference, since the consequences of her failing to pay Respondent's bill resulted in a penalty to her that was at least as severe as that of a conviction for breach of the peace. Property rights are no less deserving of constitutional protections than are personal rights. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

> Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be . . . By its inaction the Authority, and through it the state, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." 365 U.S. at 725.

Similarly, in failing to impose due process requirements on Metropolitan Edison's tariffs the state has effectively abdicated its responsibility in this area.[38] See *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972) in this regard.

In conclusion, whether the above state action theories are applied separately or cumulatively to Metropolitan Edison, they show a picture of state involvement that has a significant effect on a customer's relations with a public utility. Mrs. Jackson and her family were in no position to bargain with Metropolitan Edison for a delay or reconsideration in the termination decision; they could seek electricity from no one else in their area when their service was terminated. The utility's regulations, which have the effect of law, and which were approved by the Commission, provided her in theory with nothing more than some notice. When no such notice was provided to Petitioner, she had no redress. The state had specifically exempted from the

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[38] In this regard, it may be noted that state action, based in part upon state "inaction" was found in other utility termination cases. For example, see *Bronson v. Consolidated Edison of New York, Inc.*, 350 F.Supp. at 447, where the court noted that the statute authorizing termination of service did not go "far enough", since it failed to also provide for due process protections.

requirement of prior Commission approval, the termination of service for nonpayment of bills. Finally, the company was legally empowered to enter Mrs. Jackson's home to shut-off electricity at her meter. The end result is a denial of fundamental fairness to Mrs. Jackson and to other utility customers, and both Metropolitan Edison and the state must jointly bear a direct responsibility for this result.

DUE PROCESS OF LAW REQUIRES THAT BEFORE PETITIONER'S ESSENTIAL UTILITY SERVICES MAY BE TERMINATED, PETITIONER MUST BE PROVIDED WITH ADEQUATE PRIOR NOTICE AND OPPORTUNITY TO BE HEARD.

A. Due process of law is necessary in order to prevent the arbitrary and erroneous deprivation of a statutorily conferred entitlement or property right essential to life and health.

This Court has repeatedly reaffirmed the principle that, "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy the right they must first be notified." *Baldwin v. Hale*, 68 U.S. 223, 233 (1863), as cited in *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Additionally, for those rights to be effective they "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). A deprivation of a property interest or entitlement requires that the opportunity to be heard and to contest the deprivation be provided before the loss of the property or benefit. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

The Pennsylvania Public Utility Law, by mandating that "reasonably continuous" utility service be provided on a non-discriminatory basis, 66 Pa. Stat. Anno. §§1171, 1144, confers by statute a benefit or entitlement to utility customers no less important, than other property interests or personal rights heretofore afforded due process protection by this Court. *Fuentes v. Shevin*, supra, (household goods); *Bell v. Burson*, supra (driver's license); *Goldberg v. Kelly*, supra (welfare benefits).[39] See also *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

Electricity services, as with other utility services, have been described by this Court and lower courts as "necessities of life".[40] One lower federal court, in explaining the greater threat to life and health that arises from termination of heat or electricity as compared with the termination of welfare benefits considered in *Goldberg v. Kelly*, observed that "A person can freeze to death or die of pneumonia much more quickly than he can starve to death."[41] This

[39] The great majority of lower courts considering the issue have held that utility customers possess a constitutionally protected interest not to have their utility service arbitrarily terminated. *See, e.g., Palmer v. Columbia Gas Co.*, 342 F.Supp. 241, 244 (N.D., Ohio, 1972) aff'd, 479 F.2d 153 (6th Cir., 1973); *Bronson v. Consolidated Edison Co.*, 350 F.Supp. at 447; *Stanford v. Gas Service Co.* 346 F.Supp. 717, 719-21 (D.Kan. 1972); *Lamb v. Hamblin*, Util. L.Rep. (State) §21, 850 (D., Minn., Nov. 30, 1972); *Davis v. Weir*, 328 F.Supp. 317, 321-22 (N.D., Ga., 1971); *cf. Lucas v. Wisconsin Electric Power Co.*, 438 F.2d 248, 646 n. 13 (7th Cir., 1972) *cert. den.* 409 U.S. 1114 (1973).

[40] *Moose Lodge 107 v. Irvis*, 407 U.S. 163, 173 (1972); *Jones v. City of Portland*, 245 U.S. 217, 223 (1917); *Stanford v. Gas Service Co.*, supra, 346 F.Supp. at 720; *Davis v. Weir*, supra, 328 F.Supp. at 321; *Bronson v. Consolidated Edison Co. of New York, Inc.*, 350 F.Supp. at 447. Also see *infra*, pp. 16-17.

[41] *Palmer v. Columbia Gas Co. of Ohio*, 342 F.Supp. 241, 244 (N.D., Ohio, 1972), aff'd. 479 F.2d 153.

observation became a tragic reality this year when the media reported the deaths of utility customers whose services were summarily terminated.[42] Such utility terminations most often cause their greatest hardship on the poor and elderly.[43] See *Palmer v. Columbia Gas of Ohio*, supra, 479 F.2d at 169; Shelton, "The Shutoff of Utility Services for Non-payment: A Plight of the Poor," 46 Washington L.Rev. 745 (1971); Note, "Public Utilities and the Poor", 78 Yale L.J. 448 (1969).[44]

Certainly the facts in this case show the suffering experienced by a low income mother living alone with two minor children all of whom had to live in their home for eight days and nights without lighting, adequate heat, or hot water for cooking or hygienic purposes. The temporary judicial relief obtained may well have prevented the colds experienced by the two children in this period from becoming more serious threats to their health.

The current situation involving unfettered termination power leads to erroneous terminations and constitutes an additional reason to apply due process protections in utility termination situations. Thus, one federal court was moved to comment on the "Orwellian nightmare of computer control which breaks down

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[42] "Elderly Couple Found Frozen in Syracuse Home", *The New York Times*, Dec. 26, 1973 (electricity termination making gas furnace inoperative); "Man, Seventy-one, Freezes to Death After Utility Shuts Off Gas", *Boston Globe*, p. 17 (Feb. 9, 1974); "Tragedies: A Winter's Tale", *Newsweek*, p. 28 (Jan. 8, 1974).

[43] See also Amicus Brief of the National Consumer Law Center.

[44] The casual observation of the Court of Appeals that there is no "threat" to life from utility termination is thus contradicted by real events. (A-88).

through mechanical and programmers' failures and errors."[45]

The monopoly nature of the utility service further gives little incentive to qualify the unrestricted use of the termination power in order to be competitive or to retain good will from such customers. See Note, 86 Harv. L.Rev. at 1477. Abuse of the termination power is common with utility employees evoking a "shockingly callous and impersonal attitude" toward customers.[46] The irresponsible conduct of the Metropolitan Edison representative in this case is apparent when he indicated to Mrs. Jackson that a $30.00 payment would be required and would be accepted four days later, and, instead of returning to collect it, sent or allowed other company representatives to come and cut-off the electricity on that day.

Arbitrariness and unfairness further results from questionable billing practices and erroneous terminations despite full payment of the bill. See Note, 48 N.Y.U. L.Rev. supra at 515. Further, the unequal bargaining position of the consumer, particularly the low income consumer, makes it unlikely for him or her either to be familiar with or able to afford litigation remedies for a utility dispute.[47] cf., *Fuentes v. Shevin*,

[45] *Bronson v. Consolidated Edison Co. of New York*, supra, 350 F.Supp. at 444.

[46] *Palmer v. Columbia Gas of Ohio*, supra, 342 F.Supp. at 243, aff'd 479 F.2d 153. An employee's response to a customer who claimed he paid a bill was "Tough. Pay the bill again." 479 F.2d at 158. Another advised a cut-off victim, "Run around to keep warm." *Id.* at 168.

[47] *Palmer v. Columbia Gas of Ohio*, 479 F.2d at 748-52. Other limitations on tort remedies include the delay and burdensomeness to a customer who would pay an unjust bill to avoid loss of service and expenses of litigation. See Note, 86 Harv. L.Rev. at 1477, n. 26.

407 U.S. at 83 n. 13 (1972). Finally, customers often have valid defenses and bases for contesting bills for the above and other reasons.[48] Mrs. Jackson herself questioned, to no avail, whether she was legally liable for the utility services for which she claimed Dodson had contracted.

It is apparent that "unjust terminations exact a high personal and societal cost, as measured in demoralization and frustration, and are offensive to our society's basic notions of fairness."[49] It was this kind of frustration caused by a "lack of accessible and visible means of establishing the merits of grievances" that was highlighted as a key factor in the civil disorders of the 1960's.[50]

It is submitted that this Court's rationale for applying due process protection in *Goldberg v. Kelly*, is certainly as applicable to the case of utility terminations. Thus:

> "[T]he stakes are simply too high ... and the possibility for honest error or irritable misjudg-

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[48] Recognized customer claims and defenses which could be raised at prior hearings if the opportunity were provided include: overcharging mistakes and failure to record full payment of outstanding bills, *Bronson*, 350 F.Supp. at 445, supra, 342 F.Supp. at 243; inaccurate or inoperative meter, *Crews v. Jacksonville Elec. Authority*, Pov. L.Rep. §13,647 (Fla. Cir. Ct., 1971); inadequacy of service due to faulty utility equipment, *York Tel. and Tel. Co. v. Pa. P.U.C.*, 181 Pa. Super. 11, 121 A.2d 605 (1956); customer's refusal to pay debt of prior owner or tenant, *Tyrone Gas and Water Co. v. P.S.C.*, 77 Pa. Super. 292 (1921); denial of service to wife upon husband's refusal to pay his bill, *Southwestern Bell Tel. Co. v. Batesmar*, 266 S.W.2d 289 (Ark. 1954) See also *Shelton*, 46 Wash. L.Rev. at 763-64.

[49] Note, supra, 86 Harv. L.Rev. at 1482.

[50] See Report of the Nat'l Advisory Comm'n on Civil Disorders, 291 (1968). See also Amicus Brief of National Consumer Law Center, page 9, quote from "Mark Twain's Notebook."

ment too great, to allow termination . . . without giving . . . the recipient a chance . . . to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." 397 U.S. 254 at 266 (1970).

B. Due process for utility termination situations requires adequate prior notice of the nature and means of resolution of the dispute, and an opportunity for an oral hearing, prior to the termination of essential utility services.

While "due process is perhaps the least frozen concept of our law", *Griffin v. Illinois*, 378 U.S. 1 (1958) (Frankfurter J. concurring), it is apparent that when "protected interests" are at stake, the right to some kind of prior hearing is required. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).

In this case, the Petitioner had a statutory entitlement to the continued receipt of electrical services to the extent that such services could not be terminated in the absence of due process of law. 66 Pa. Stat. Anno. §1171. In this regard, it has been held by this Court that property interests requiring constitutional protection "extend well beyond the actual ownership of real estate, chattels or money", *Roth, supra* at 572. They extend as well to "safeguard . . . the security of interests that a person has acquired in specific benefits." *Id.* See also *California Department of Human Resources v. Java*, 402 U.S. 121 (1971); *Goldberg v. Kelly, supra.* Thus, to have a property interest in a benefit, a person must have a legitimate claim of entitlement to it. Since protection must be afforded to "those claims upon which people rely in their daily lives," such reliance must not be "arbitrarily under-

mined." *Roth*, supra at 576-577. It cannot be doubted in this case that Mrs. Jackson and her children were arbitrarily deprived of an entitlement upon which they relied as a necessity of life.

Due process requires minimally that prior notice be provided that is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Grannis v. Ordean*, 234 U.S. 385 (1914); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), at a hearing at a meaningful time and in a meaningful manner, *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Boddie v. Connecticut*, 401 U.S. 371 (1971). Such hearing must take place before the utility customer is condemned to suffer a "grievous loss". *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concuring). No state interest is present herein which warrants a deprivation prior to the hearing. *Fuentes v. Shevin*, 407 U.S. 67 (1972). The grievous loss to the customer outweighs any competing state interest, as Mrs. Jackson and her children can readily affirm.

A utility customer must be given a notice sufficiently in advance to permit adequate opportunity to prepare for and be present at the hearing. *Mullane v. Central Hanover Bank and Trust Co.*, supra. The notice must provide the customer with the information he needs to quickly and intelligently take available steps to prevent the threatened termination of service. *Palmer*, 479 F.2d at 166; *Bronson*, 350 F.Supp. at 450. Thus, the customer should be advised of the possibility of resolution of the dispute by contacting a particular company representative. *Palmer, supra* at 166. Further-

more, the notice should advise of the right to either appeal to the state regulatory commission or to have a de novo formal or informal hearing before the regulatory commission. *Bronson*, supra at 449. Of course, the customer must be advised of the right to continued utility service in the event that the dispute resolution procedure is invoked. *Palmer*, supra, 166. While the reasonableness of any notice procedure must be considered in the light of the circumstances of each particular case, *Covey v. Town of Somers*, 351 U.S. 141 (1956), it is submitted that the above notice requirements are the very rudiments of a fair warning procedure.[51]

There is currently insufficient or no notice to the consumer before termination despite requirements of some notice. Notwithstanding Metropolitan Edison's tariff approved by the Commission, providing for "reasonable notice", no notice whatsoever was provided to Mrs. Jackson prior to or on the Monday she was expecting a company representative to receive a $30.00 payment; she made fruitless phone calls to company employees, even to the home of one of the employees, to protest and seek some redress. This case is illustrative of a pattern which has emerged from other federal utility termination cases.[52] In addition, this case and

[51] This Court has stressed the fact that particularly the uneducated, uninformed consumer cannot be presumed to know his legal rights or how to seek redress for them. *Fuentes v. Shevin*, 407 U.S. at 83 n.13.

[52] In *Palmer* "shut-offs [were] sometimes being made without warning . . . [W]hen the collectors went out to shut-off gas, they frequently did so without any announcement whatever to the consumer, even though the consumer was sitting right in his house, so that the first notice he would have of the shut-off was that his house got cold, or his kitchen range would not light . . ." 342 F.Supp. at 243. Ohio law requires 24 hours' notice before workmen could enter the home and disconnect the meter. Id. at 245. In *Davis v. Weir*, absolutely no notice was provided the consumer-tenant before water service was shut-off. 328 F.Supp. at 320.

others attest to the inadequacy of notice when and if it does come. Although Mrs. Jackson was told that money was owing she was never even presented with any bills or explanation why she, rather than Dodson, should pay the entire sum allegedly owing.[53] Nor was she warned that her electricity would be discontinued for failure to pay the bill.

Due process also requires an opportunity to be heard in a manner appropriate to the nature of the case. The hearing must naturally take place before an impartial third party. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. at 267-71. The burden of proof should be placed on the utility company to prove that the bill is due. *Wood v. City of Auburn*, 87 Me. at 293. In addition, the utility customer must be permitted to examine the company's records in advance, cross examine adverse witnesses and present his or her own case, with the assistance of a representative, if necessary. *Goldberg v. Kelly*, supra, at 267-271.

The experience with utilities has shown that their shut-off and complaint procedures are grossly inadequate with "unresponsiveness or 'runarounds' the only answer to [the customer's] inquiries." *Bronson*, supra, 350 F. Supp. at 448.[54] No hearings are provided and

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[53] In *Bronson* the consumer merely received a 3" x 8" slip of paper with a bare one sentence "we are sorry" notice that the court found constitutionally inadequate. 350 F.Supp. at 450. See also *Palmer*, supra, 342 F.Supp. at 242-44.

[54] See also, *e.g.*, *Palmer v. Columbia Gas Co.*, 342 F.Supp. at 243-44; Note, supra, 48 N.Y.U. L.Rev. supra, at 517.

recourse to regulatory commissions for hearings have been generally fruitless.[55] In addition, the alternative of "pay first and litigate later" as sanctioned by the Court of Appeals at (A-91) is simply a "non-alternative"[56] *Bronson v. Consolidated Edison Co. of New York*, 350 F. Supp. at 449, for poor persons. Recourse to other formal or informal remedies are equally inadequate.[57]

It should be noted that a formal adjudicatory hearing, which the state regulatory agency could schedule and conduct, need not be the first or sole method of dispute resolution. Utilities may wish to establish complaint bureaus, under state regulation, before formal hearings are scheduled. These proceedings will undoubtedly lead to the prompt and low-cost resolution of most termination disputes, leaving the more protracted or complex disputes for the formal adjudicatory hearing. The experience in New York State, where the dual conference-type hearing and

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[55] The Petitioner herself filed a complaint with the Pa. Public Utility Commission to seek rulemaking hearings to establish rules for hearings prior to termination of service but the complaint, deemed a petition, was summarily dismissed. See footnote No. 36 supra.

[56] See Shelton, "The Shutoff of Utility Services for Nonpayment: A Plight of the Poor." 46 Wash. L.Rev. 745, 748-52 (1971). The Third Circuit's reference below to small claims courts 438 F.2d at 760 n. 11. entirely ignores the fact that these bodies have no equity powers and cannot restore terminated service, and further, that consumers are never given notice and do not otherwise know that these bodies exist to deal post-facto with billing disputes. See also *Fuentes v. Shevin*, 407 U.S. 67, 83, n. 13 (1972).

[57] See contra, *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d at 649, where the court held that adequate administrative remedies in fact existed in that case.

formal evidentiary-type hearing system utilizing impartial Public Service Commission officers has been in use for some time, concretely demonstrates the workability and effectiveness of the due process procedures suggested above.[58]

The decision below relies heavily on the view that utility service is not so important as to warrant due process protection. This is refuted by this Court's decisions above protecting similar interests or property entitlements. *Board of Regents v. Roth*, 408 U.S. 564 (1972). This Court has further rejected as constitutionally deficient, the procedures allowing for the taking of property pending a final judgment and those allowing for posting of a bond or security to regain property. *Fuentes v. Shevin*, 407 U.S. at 72-73.

The Court below also accepted the premise that utility service could be arbitrarily or wrongfully terminated and the wrong remedied by full payment of the disputed bill followed by a claim for a refund, in court if necessary. 483 F.2d at 760-61. (A-89). Even assuming the validity of the assumption that claiming and suing for a refund are available remedies, this premise ignores the recent holding of this Court that:

> "[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not embraced the general proposition that a wrong may be done if it can be undone.' *Stanley v. Illinois*, 405 U.S. 645, 647 . . ."

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[58] See Amicus Brief of the Public Service Comm'n of the State of New York; see also Note, supra, 86 Harv. L.Rev. at 1503.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the Judgment and Order of the Third Circuit Court of Appeals, and hold that Respondent did act under color of law in terminating Petitioner's electrical services without the adequate prior notice and opportunity to be heard required by due process of law. Petitioner requests that this case be remanded to the district court for a determination and further proceedings in accordance with the opinion herein.

Respectfully submitted:

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APPENDIX A

STATUTES, REGULATIONS AND TARIFFS

A. Pennsylvania Public Utility Code

Pennsylvania Statutes Annotated, Title 66, Sections:

a. §452. Commission established; terms of office; qualifications of members; chairman; compensation; quorum

(a) A commission to be known as the Pennsylvania Public Utility Commission is hereby created. The commission shall consist of five members who shall be appointed by the Governor, by and with the advice and consent of two-thirds of all the members of the Senate. The commissioners first appointed under this act, shall continue in office for terms of two, four, six, eight, and ten years, respectively, from the effective date of this act, but their successors shall each be appointed for a term of ten years. No commissioner, upon the expiration of his term as aforesaid, shall continue to hold office until his successor shall be duly appointed or shall be qualified. Each commissioner, at the time of his appointment and qualification, shall be a resident of the Commonwealth of Pennsylvania, and shall have been a qualified elector therein for a period of at least one year next preceeding his appointment, and shall also be not less than thirty years of age.

(b) A member designated by the Governor shall be the chairman of the commission during such member's term of office. When present, the chairman shall preside at all meetings, but in his absence a member, designated by the chairman, shall preside and shall exercise, for the time being, all the powers of the chairman.

(c) Each of the commissioners shall receive an annual salary of nineteen thousand dollars ($19,000.00), except the chairman, who shall receive an annual salary of twenty thousand dollars ($20,000.00).

(d) Three members of the commission shall constitute a quorum who, for all purposes, including the making of any order or the ratification of any act done or order made by one or more of the commissioners, must act unanimously. 1937, March 31, P.L. 160, §1; 1943, March 31, P.L. 32, §1; 1949, March 31, P.L. 369, No. 32, §1, 1957, July 16, P.L. 949, No. 408, §1.

b. §461. Powers and duties of commission.

The Pennsylvania Public Utility Commission shall exercise the powers and perform the duties exercised and performed prior to the effective date of this act by the Public Service Commission of the Commonwealth of Pennsylvania, and any powers and duties subsequently vested in and imposed upon the Pennsylvania Public Utility Commission by law. 1937, March 31, P.L. 160, §10.

c. §462. Additional powers and duties

The Pennsylvania Public Utility Commission shall have the power and its duties shall be -

(a) To administer and enforce the act, approved the twenty-eighth day of May, one thousand nine hundred thirty-seven (Pamphlet Laws, one thousand fifty-three), designated as the "Public Utility Law", as amended and supplemented, or any law hereafter enacted for the regulation of public utilities.

(b) To certify to the Department of Health any question of fact regarding the purity of water supplied to the public by any public service company or public utility over which it has jurisdiction, when any such question arises in any controversy or other proceeding before it, and upon the determination of such question by the Department of Health, to incorporate the findings of the board thereon in its decision upon the controversy or other proceeding out of which the question arose. 1937, March 31, P.L. 160, §11; 1941, July 8, P.L. 284, §1.

d. §1101 Short title

This act shall be known, and may be cited, as the "Public Utility Law". 1937, May 28, P.L. 1053, art. I, §1.

e. §1121 Organization of public utilities and beginning of service.

Upon the approval of the commission, evidenced by its certificate of public convenience first had and obtained, and not otherwise, it shall be lawful for any proposed public utility.

(a) To be incorporated, organized, or created: Provided, That existing laws relative to the incorporation, organization, and creation of such public utilities shall first have been complied with, prior to the application to the commission for its certificate of public convenience.

(b) To begin to offer, render, furnish, or supply service within this Commonwealth, 1937, May 28, P.L. 1053, art. II, §201. (emphasis added)

f. §1122. Enumeration of facts requiring certificate

Upon approval of the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful:

(a) For a foreign public utility to obtain the right to do business within this Commonwealth, if existing laws permit such foreign public utility to exercise its powers and franchises within this Commonwealth.

(b) For any public utility to renew its charter, or obtain any additional right, power, franchise, or privilege, by any amendment or supplement to its charter, or otherwise.

(c) For any public utility to begin the exercise of any additional right, power, franchise, or privilege.

(d) For any public utility to dissolve, or to abandon or surrender, in whole or in part, any service, right, power, franchise, or privilege: Provided, That the provisions of this paragraph shall not apply to discontinuance of service to a patron for nonpayment of a bill, or upon request of a patron. (emphasis added).

(e) For any public utility, except a common carrier by railroad subject to the Interstate Commerce Act, to acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service: Provided, however, That such approval shall not be required - (1) if the undepreciated book value of the property to be acquired or transferred does not exceed one thousand dollars; or (2) if the undepreciated book value of the property to be acquired or transferred does not exceed the lesser of - (a) two per centum of the undepreciated book value of all of the fixed assets of such public utility, or (b) five thousand dollars in the case of personality or

fifty thousand dollars in the case of realty; or (3) if the property to be acquired is to be installed new as a part of or consumed in the operation of the used and useful property of such public utility; or (4) if the property to be transferred by such public utility is obsolete, worn out or otherwise unserviceable.

But exceptions (1), (2), (3), and (4) shall not be applicable, and approval of the commission evidenced by a certificate of public convenience shall be required, if any such acquisition or transfer of property involves a transfer of patrons.

(f) For any public utility to acquire five per centum or more of the voting capital stock of any corporation.

(g) For any municipal corporation to acquire, construct, or begin to operate any plant, equipment, or other facilities for the rendering or furnishing to the public of any public utility service beyond its corporate limits. 1937, May 28, P.L. 1053, art. II, §202; 1938, Sp. Sess., Sept. 28, P.L. 44, §1; 1939, June 19, P.L. 419, §1.

g. §1123 Procedure to obtain certificates of public convenience

(a) Every application for a certificate of public convenience shall be made to the commission, in writing, be verified by oath or affirmation, and be in such form, and contain such information, as the commission may require by its regulations. A certificate of public convenience shall be granted by order of the commission, only if and when the commission shall find or determine that the granting of such certificate is necessary or proper for the service accomodation, convenience, or safety of the public; and the commission in granting such certificate, may impose such conditions as it may deem to be just and reasonable. In every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted. Any holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate.

(b) For the purpose of enabling the commission to make such finding or determination, it shall hold such hearings, which shall be public, and, before or after hearing, it may make such inquiries, physical examinations, valuations, and investigations, and may require such plans, specifications, and estimates of cost, as it may deem necessary or proper in enabling it to reach a finding or determination. 1937, May 28, P.L. 1053, art. II, §203. (emphasis added).

h. §1124. Certain appropriations by the right of eminent domain prohibited

Neither a proposed domestic public utility hereafter incorporated nor a foreign public utility hereafter authorized to do business in this Commonwealth shall exercise any power of eminent domain within this Commonwealth until it shall have received the certificate of public convenience required by section 201 of this act. 1937, May 28, P.L. 1053, art. II, §204, added, 1963, Aug. 28, P.L. 1225, §3.

i. §1141. Rates to be just and reasonable.

Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission; Provided, That only public utility service being furnished or rendered by a municipal corporation, or by the operating agencies of any municipal corporation, beyond its corporate limits, shall be subject to regulation and control by the commission as to rates, with the same force, and in like

manner, as if such service were rendered by a public utility. 1937, May 28, P.L. 1053, art. III, §301; 1939, March 21, P.L. 10, No. 11, §2.

j. §1142. Tariffs; filing and inspection

Under such regulations as the commission may prescribe, every public utility shall file with the commission, within such time and in such form as the commission may designate, tariffs showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission. The tariffs of any public utility also subject to the jurisdiction of a Federal regulatory body shall correspond, so far as practicable, to the form of those prescribed by such Federal regulatory body. Every public utility shall keep copies of such tariffs open to public inspection under such rules and regulations as the commission may prescribe. 1937, May 28, P.L. 1053, art. III, §302.

k. §1144. Discrimination in rates

No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service. Unless specially authorized by the commission, no public utility shall make, demand, or receive any greater rate in the aggregate for the transportation of passengers or property of the same class, or for the transmission of any message or conversation for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or any greater rate as a through rate than the aggregate of the intermediate rates. Nothing herein contained shall be deemed to prohibit the establishment of reasonable zone or group systems, or classifications of rates or, in the case of common carriers, the issuance of excursion, commutation, or other special tickets, at special rates, or the granting of nontransferable free passes, or passes at a discount to any officer, employee, or pensioner of such common carrier. No rate charged by a municipality for any public utility service rendered or furnished beyond its corporate limits shall be considered unjustly discriminatory solely by reason of the fact that a different rate is charged for a similar service within its corporate limits. 1937, May 28, P.L. 1053, art. III, §304.

l. §1148. Voluntary changes in rates

(a) Unless the commission otherwise orders, no public utility shall make any change in any existing and duly established rate, except after sixty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The public utility shall also give such notice of the proposed changes to other interested persons as the commission in its discretion may direct. All proposed changes shall be shown by filing new tariffs, or supplements to existing tariffs filed and in force at the time. The commission, for good cause shown, may allow changes in rates, without requiring the sixty days' notice, under such conditions as it may prescribe.

(b) Whenever there is filed with the commission by any public utility any tariff stating a new rate, the commission may, either upon complaint or upon its own motion, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, and pending such hearing and the decision thereon, the commission,

upon filing with such tariff and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before it becomes effective, suspend the operation of such rate for a period not longer than six months from the time such rate would otherwise become effective, and an additional period of not more than three months pending such decision. The rate in force when the tariff stating the new rate was filed shall continue in force during the period of suspension, unless the commission shall establish a temporary rate as authorized in section three hundred ten of this act. The commission shall consider the effect of such suspension in finally determining and prescribing the rates to be thereafter charged and collected by such public utility.

(c) If, after such hearing, the commission finds any such rate to be unjust, or unreasonable, or in anywise in violation of law, the commission shall determine the just and reasonable rate to be charged or applied by the public utility for the service in question, and shall fix the same by order to be served upon the public utility; and such rate shall thereafter be observed until changed as provided by this act. 1937, May 28 P.L. 1053, art. III, §308.

m. §1149. Rates fixed on complaint.

Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the existing rates of any public utility for any service are unjust, unreasonable, or in anywise in violation of any provision of law, the commission shall determine the just and reasonable rates (including maximum or minimum rates) to be thereafter observed and in force and shall fix the same by order to be served upon the public utility, and such rates shall constitute the legal rates of the public utility until changed as provided in this act. Whenever a public utility does not itself produce or generate that which it distributes, transmits, or furnishes to the public for compensation, but obtains the same from another source, the commission shall have the power and authority to investigate the cost of such production or generation in any investigation of the reasonableness of the rates of such public utility. 1937, May 28, P.L. 1053, art. III, §309.

n. §1171. Character of service and facilities.

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accomodation, convenience and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this act and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions with the same force and in like manner as if such service were rendered by a public utility. 1937, May 28, P.L. 1053, art. IV, §401.

0. §1172. Discrimination in service

No public utility shall, as to service, make or grant any unreasonable prefer-

ence or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service, but nothing herein contained shall be deemed to prohibit the establishment of reasonable classifications of service. 1937, May 28, P.L. 1053, art. IV, §402.

p. §1182. Standards of service and facilities

The commission may, after reasonable notice and hearing, upon its own motion or upon complaint, prescribe as to service and facilities, including the crossing of facilities, just and reasonable standards, classifications, regulations and practices to be furnished, imposed, observed, and followed by any or all public utilities; prescribe adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage, or other condition pertaining to the supply of the service of any and all public utilities; prescribe reasonable regulations for the examination and testing of such service, and for the measurement thereof; prescribe or approve reasonable rules, regulations, specifications, and standards to secure the accuracy of all meters and appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any service of any public utility. 1937, May 28, P.L. 1053, art. IV, §412; 1937 Sp. Sess., Sept. 28, P.L. 44, §1.

q. §1183. Regulation of Service

Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient or unreasonably discriminatory, or otherwise in violation of this act, the commission shall determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accomodation, and convenience of the public, and shall fix the same by its order or regulation. 1337, May 28, P.L. 1053, art. IV, §413.

r. §1211. Mandatory systems of accounts

The commission may, after reasonable notice and hearing, establish systems of accounts (including cost finding procedures) to be kept by public utilities, or may classify public utilities and establish a system of accounts for each class, and prescribe the manner and form in which such accounts shall be kept. Every public utility shall establish such systems of accounting, and shall keep such accounts in the manner and form required by the commission. The accounting system of any public utility also subject to the jurisdiction of a Federal regulatory body shall correspond, as far as practicable, to the system prescribed by such Federal regulatory body: Provided, That the commission may require any such public utility to keep and maintain supplemental or additional accounts to those required by any such regulatory body. 1937, May 28, P.L. 1053, art. V, §501.

s. §1217. Inspection of books and records by commission.

The commission shall at all times have access to, and may designate any of its employees to inspect and examine, any and all accounts, records, books, maps, inventories, appraisals, valuations, or other reports, documents, and memoranda kept by public utilities, or prepared or kept for them by others; and the commission may require any public utility to file with the commission copies of any or all of such accounts, records, books, maps, inventories, appraisals, valuations, or other reports, documents and memoranda. 1937, May 28, P.L. 1053, art. V, §507.

t. §1241. Registration of securities to be issued or assumed.

(a) Under such regulations as the commission may prescribe, every public utility, before it shall execute, cause to be authenticated, deliver, or make any change or extension in any term, condition, or date of, any stock certificate or other evidence of equitable interest in itself, or any bond, note, trust certificate, or other evidence of indebtedness of itself, any or all of which acts are hereinafter included in the term "issuance of securities", shall have filed with the commission, and shall have received from the commission, notice of registration of a document to be known as a securities certificate: Provided, That neither (1) the execution, authentication, or delivery of securities to replace identical securities lost, mutilated, or destroyed while in the ownership of a bona fide holder-for-value, who properly indemnifies the public utility, therefor, nor (2) the execution, authentication, or delivery of securities in exchange for the surrender of identical securities, solely for the purpose of registering or facilitating changes in the ownership thereof between bona fide holders-for-value, which surrendered securities are thereupon cancelled, nor (3) the delivery from the treasury of the public utility of securities previously reacquired from bona fide holders-for-value and held alive, shall be deemed an issuance of securities under this subsection: And provided further, That the requirements of this paragraph shall not apply to the issuance of - (1) any evidence of indebtedness, the date of maturity, or which is at a period of less than one year from the date of its execution, (2) any evidence of indebtedness for which no date of maturity is fixed, but which matures upon demand of the holder, (3) any evidence of indebtedness in the nature of a contract between a public utility and a vendor of equipment wherein the public utility promises to pay installments upon the purchase price of equipment acquired, and which is not in the form of an equipment trust certificate or similar instrument readily marketable to the general public.

(b) Under such regulations as the commission may prescribe, every public utility, before it shall assume primary or contingent liability for the payment of any dividends upon any stocks, or of any principal or interest of any indebtedness, created or incurred by any other person or corporation, any or all of which acts are hereinafter included in the term "assumption of securities", shall have filed with the commission, and shall have received from the commission, notice of registration of a document to be known as a Securities Certificate: Provided, however, That the requirements of this paragraph shall not apply to an assumption of securities if the commission shall have approved the acquisition of all of the property of the issuing company by the assuming company, as provided in paragraph (e) of section two hundred two of this act. 1937, May 28, P.L. 1053, art. VI, §601; 1938, Sp. Sess., Sept. 28, P.L. 44, §1.

u. §1271. Contracts for services.

(a) Within thirty days after the effective date of this act, every public utility having in force any contract with an affiliated interest for the furnishing

to such public utility of any management, supervisory, purchasing, construction, engineering, financing, or other services, shall file a copy of such contract, or if oral, a complete statement of the terms and conditions thereof, with the commission.

(b) Every public utility which shall hereafter enter into any such contract, or which shall change any such existing contract, shall file a copy of such contract with the commission within ten days after its execution or change.

(c) The commission shall have authority at any time to investigate every such contract filed in accordance with this section, and, if after reasonable notice and hearing, it shall determine that the amounts paid or payable thereunder are in excess of the reasonable cost of furnishing the services provided for in the contract, or that such services are not reasonably necessary and proper, it shall order such amounts, in so far as found excessive, to be stricken from the books of account of the public utility as charges to fixed capital, or operating expenses, as the case may be, and shall not consider such amounts in any proceeding. In any proceeding involving such amounts, the burden of proof to show that such amounts are not in excess of the reasonable cost of furnishing such service, and that such services are reasonable and proper, shall be on the public utility. 1937, May 28, P.L. 1053, art. VII, §701.

v. §1276. Contracts in violation of act void

Every contract with an affiliated interest, made effective or modified in violation of any provision of this act, or of any regulation or order of the commission made under this act, shall be void; and any purchase, sale, payment, lease, loan or exchange of any service, property, money, security, right, or thing under such contract, or under any contract with an affiliated interest, the terms of which shall have been breached by the affiliated interest, shall be unlawful. 1937, May 28, P.L. 1053, art. VII, §706.

w. §1341. Administrative authority of commission; regulations

The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistant with the law, as may be necessary or proper in the exercise of its powers or for the performance of its duties under this act. 1937, May 28, P.L. 1053, art. IX, §901.

x. §1342. Commission to enforce act

In addition to any powers hereinbefore expressly enumerated in this act, the commission shall have full power and authority, and it shall be its duty, to enforce, execute, and carry out, by its regulations, orders, or otherwise, all and singular the provisions of this act, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this act shall not exclude any power which the commission would otherwise have under any of the provisions of this act. 1937, May 28, P.L. 1053, art. IX, §902.

y. §1343. Enforcement proceedings by commission

Whenever the commission shall be of opinion that any person or corporation including a municipal corporation, is violating, or is about to violate, any

provisions of this act; or has done, or is about to do, any act, matter, or thing herein prohibited or declared to be unlawful; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse, to perform any duty enjoined upon it by this act; or has failed, omitted, neglected or refused or is about to fail, omit, neglect, or refuse to obey any lawful requirement, regulation, or order made by the commission; or any final judgment, order, or decree made by any court, then and in every case the commission may institute in the court of common pleas of Dauphin County, injunction, mandamus, or other appropriate legal proceedings, to restrain such violations of the provisions of this act, or of the regulations, or orders of the commission, and to enforce obedience thereto; and such court of common pleas is hereby clothed with exclusive jurisdiction throughout the Commonwealth to hear and determine all such actions. No injunction bond shall be required to be filed by the commission. Such persons, corporations, or municipal corporations as the court may deem necessary or proper to be joined as parties, in order to make its judgment, order or writ effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding, or direct that the writ of mandamus or injunction issue or be made permanent as prayed for in the petition, or in such modified or other form as will afford appropriate relief. 1937, May 28, P.L. 1053, art. IX, §903, as amended, 1971 June 3, P.L. -, No. 6, §1 (§509(a)(115)).

z. §1345. Reports by public utilities

The commission may require any public utility to file periodical reports at such times and in such form, and of such content, as the commission may prescribe, and special reports concerning any matter whatsoever about which the commission is authorized to inquire, or to keep itself informed, or which it is required to enforce. The commission may require any public utility to file with it a copy of any report filed by such public utility with any Federal department or regulatory body. All reports shall be under oath or affirmation when required by the commission. 1937, May 28, P.L. 1053, art. IX, §905.

aa. §1347. Adherence to regulations and orders of commission and courts.

Every public utility, its officers, agents, and employees, and every other person or corporation subject to the provisions of this act, affected by or subject to any regulations or orders of the commission, or of any court, made, issued, or entered under the provisions of this act, shall observe, obey and comply with such regulations or orders, and the terms and condition thereof, so long as the same shall remain in force. 1937, May 28, P.L. 1053, art. IX, §907.

bb. §1348. Inspection of, and access to, facilities and records of public utilities

The commission shall have full power and authority, either by or through its members, or duly authorized representatives, whenever it shall deem it necessary or proper, in carrying out any of the provisions of this act, or its duties under this act, to enter upon the premises, buildings, machinery system, plant, and equipment and make any inspection, valuation, physical examination, inquiry, or investigation of any and all plant and equipment, facilities, property, and pertinent records, books, papers, memoranda, documents, or effects whatsoever, of any public utility, and to hold any hearing for such purposes. In the performance of such duties, the commission may have access to, and use any books, records, or documents in the possession of, any department, board, or commission of the Common-

wealth, or any political subdivision thereof. 1937, May 28, P.L. 1053, art. IX, §908.

cc. §1360. Contracts; power of the commission to vary, reform or revise

The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well being of the Commonwealth.

Whenever the commission shall determine, after reasonable notice and hearing, upon its own motion or upon complaint, that any such obligations, terms, or conditions are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well being of the Commonwealth, the commission shall determine and prescribe by findings and order, the just, reasonable, and equitable obligations, terms and conditions of such contract. Such contract, as modified by the order of the commission, shall become effective thirty days after the service of such order upon the parties to such contract. 1937, May 28, P.L. 1053, art. IX, §920.

dd. §1391. Complaints

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission. Any public utility, or other person, or corporation, subject to this act, likewise may complain of any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect. The commission, by regulation, may prescribe the form of complaints filed under this section. 1937, May 28, P.L. 1053, art. X, §1001.

ee. §1395. Decisions by commission

After the conclusion of the hearing, the commission shall make and file its findings and order with its opinion, if any. Its findings shall be in sufficient detail to enable the court on appeal, to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence. A copy of such order, certified under the seal of the commission, shall be served by registered mail upon the person, corporation or municipal corporation against whom it runs, or his attorney, and notice thereof shall be given to the other parties to the proceedings, or their attorney. Such order shall take effect and become operative as designated therein, and shall continue in force either for a period which may be designated therein, or until changed or revoked by the commission. If an order cannot, in the judgment of the commission, be complied with within the time designated therein, the commission may grant and prescribe such additional time, as, in its judgment, is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. 1937, May 28, P.L. 1053, art. X, §1005.

ff. §1398. Investigations

The commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of any public utility or any other person or corporation subject to this act. In conducting such investigations the commission may proceed, either with or without a hearing, as it may deem best, but it shall make no order without affording the parties affected thereby a hearing. 1937, May 28, P.L. 1053, art. X, §1008.

B. Utilities Gross Receipts Tax

72 P.S. §8101

Every railroad company, pipeline company, conduit company, steamboat company, canal company, slack water navigation company, transportation company, and every other company, association, joint-stock association, or limited partnership, now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other state or by the United States or any foreign government, and doing business in this Commonwealth, and every copartnership, person or persons owning, operating or leasing to or from another corporation, company, association, joint-stock association, limited partnership, copartnership, person or persons, any railroad, pipeline, conduit, steamboat, canal, slack water navigation, or other device for the transportation of freight, passengers, baggage, or oil, except taxicabs, motor buses and motor omnibuses, and every limited partnership, association, joint-stock association, corporation or company engaged in, or hereafter engaged in, the transportation of freight or oil within this State, and every telephone company, telegraph company, express company, electric light company, waterpower company, hydroelectric company, gas company, palace car company and sleeping car company, how or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other state or by the United States or any foreign government and doing business in this Commonwealth, and every limited partnership, association, joint-stock association, copartnership, person or persons, engaged in telephone, telegraph, express, electric light and power, waterpower, hydro-electric, gas, palace car or sleeping car business in this Commonwealth, shall pay the the State Treasurer, through the Department of Revenue, a tax of forty-five mills upon each dollar of the gross receipts of the corporation, company or association, limited partnership, joint-stock association, copartnership, person or persons, received from passengers, baggage, and freight transported wholly within this State, from express, palace car or sleeping car business done wholly within this State, or from the sales of electric energy or gas, except gross receipts derived from sales of gas to any municipality owned or operated public utility and except gross receipts derived from the sales or resale of electric energy or gas, to persons, partnerships, associations, corporations or political subdivisions subject to the tax imposed by this act upon gross receipts derived from such resale and from the transportation of oil done wholly within this State. The gross receipts of gas companies shall include the gross receipts from the sale of artificial and natural gas, but shall not include gross receipts from the sale of liquefied petroleum gas. The said tax shall be paid within the time prescribed by law, and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of the said company, copartnership, limited partnership, association, joint-stock association or corporation, or person or persons, derived from all sources and of gross receipts from business done wholly within this State, during the period of twelve months immediately preceding January 1 of each year. It shall be the further duty of the treasurer or other proper officer of every such corporation or association and every individual liable by law to report or pay said tax, except municipalities, to

transmit to the Department of Revenue on or before April 30 of each year, a tentative report in like form and manner for each twelve month period beginning January 1, of each year. The tentative report shall set forth (i) the amount of gross receipt received in the period of twelve months next preceding and reported in the annual report; or (ii) the gross receipts received in the first three months of the current period of twelve months; and (iii) such other information as the Department of Revenue may require.

Upon the date its tentative report is required to be made, the corporation, association or individual making the report shall compute and pay to the Department of Revenue on account of the tax due for the current period of twelve months at its election (i) for the year 1971 not less than twenty-nine and one-third mills of the dollar amount of its gross receipts reported for the entire preceding period of twelve months; or (ii) for the year 1971 not less than one hundred and seventeen and one-third mills of the dollar amount of its gross receipt received within the first three months of the current period of twelve months. Notwithstanding any other provision in this section to the contrary, for the year 1972 and each year thereafter the corporation, association or individual making a tentative report shall transmit such report to the Department of Revenue on account of the tax due for the current period of twelve months and compute and make payment with such report pursuant to the provisions of the act of March 16, 1970 (P.L. 180).

The time for filing reports may be extended, estimated settlements may be made by the Department of Revenue if reports are not filed, and the penalties for failing to file reports and pay the tax shall be as prescribed by the laws defining the powers and duties of the Department of Revenue. In any case where the works of any corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons, the taxes imposed by this section shall be apportioned between the corporations, companies, copartnerships, associations, joint-stock associations, limited partnerships, person or persons in accordance with the terms of their respective leases or agreement, but for the payment of the said taxes the Commonwealth shall first look to the corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons operating the works, and upon payment by the said company, corporation, copartnership, association, joint-stock association, limited partnership, person or persons of a tax upon the receipts, as herein provided, derived from the operation thereof, no other corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons shall be held liable under this section for any tax upon the proportion of said receipts received by said corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons for the use of said works.

This article shall be construed to apply to municipalities, and to impose a tax upon the gross receipts derived from any municipality owned or operated public utility or from any public utility service furnished by any municipality, except that gross receipts shall be exempt from the tax, to the extent that such gross receipts are derived from business done inside the limits of the municipality, owning or operating the public utility or furnishing the public utility service. 1971, March 4, P.L. -, No. 2, art. XI, §1101, as amended 1971, Aug. 31, P.L. -, No. 93, §7.

C. Pa. P.U.C. - Tariff Regulations

a. Section II. PUBLIC NOTICE OF TARIFF CHANGES

1. Unless the Commission otherwise orders, no public utility to which these rules apply shall make any change in any existing and duly established tariff except after sixty (60) days' notice to the public.

2. Each notice shall plainly state the changes proposed in the tariff then in force, and the date on which the changes will become effective. (See Section III).

b. Section VIII. DISCOUNT FOR PROMPT PAYMENT AND PENALTIES FOR DELAYED PAYMENT OF BILLS

Every public utility that imposes penalties upon its customers for failure to pay bills promptly, or allows its customers discounts for prompt payment of bills, shall provide in its posted and filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed or discounts are allowed. The tariff shall also indicate clearly whether, if bills are paid by mail, the date of the postmark will be considered the date of payment.

D. Pa. P.U.C. - Electric Regulations

Rule 14 - ADJUSTMENT OF BILLS FOR AVERAGE METER ERROR

D. ACCESS TO METERS - The public utility shall at all reasonable times have access to meters, service lines and other property owned by it on customer's premises, for purposes of maintenance and operation. Neglect or refusal on the part of customers to provide reasonable access to their premises for the above purposes shall be deemed to be sufficient cause for discontinuance of service.

E. Metropolitan Edison Company Electric Tariff
Electric Pa. P.U.C. No. 41

Rule 15. Cause for discontinuance of service:

Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations, or, without notice, for abuse, fraud, or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waiver thereof.

Should the Company's service be terminated for any cause aforesaid, the minimum charge for the unexpired portion of the term shall become due and payable immediately, provided, however, that if satisfactory arrangements are subsequently made by Customer for reconnection of the service (in which event, a reconnection charge of not less than $1.00 must be paid) the immediate payment of the minimum charge for the unexpired portion of the contract term may be waived or modified as the circumstances indicate would be just and reasonable.

Company may refuse its service to, or remove its service from, any installation which, in the judgment of Company, will injuriously affect the operation of Company's system or its service to other Customers.
Issued April 30, 1971. Effective June 30, 1971

F. Kansas Statutes Annotated

K.S.A. §66-101

Power, authority and jurisdiction. The state corporation commission is given full power, authority and jurisdiction to supervise and control the

public utilities, including radio common carriers, and all common carriers, as hereinafter defined, doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.

G. Federal Statutes

a. 42 U.S.C. §1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

b. 28 U.S.C. §1343 Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, §42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, §121, 71 Stat. 637.

H. United States Constitution

Fourteenth Amendment
Section 1
Due Process Clause

. . . nor shall any state deprive any person of life, liberty or property without due process of law . . .

APPENDIX B

Man, Seventy-one, Freezes to Death After Utility Shuts Off Gas, United Press International, appearing in Boston Globe, (Feb. 9, 1974), p. 17

Man, 71, freezes to death after utility cuts off gas

United Press International

MILWAUKEE — Everybody is sorry about what happened to Harold Radtke.

The Wisconsin Public Service Corp. (PSC) turned off the gas at Radtke's home in Peshtigo Jan. 28 because he had not paid his gas bill for three months.

The 71-year-old bachelor's frozen body was found Tuesday, lying face up on the floor of his home, dressed in five shirts. There were several blankets on his sleeping couch. Radtke had apparently been trying to get warmth from a vacuum cleaner motor and an electric heating plate.

The temperature outside was 1 degree above zero. Inside it was 20. Pans of water on the stove were frozen. So were the toilet and the kitchen sink.

A spokesman for the PSC said yesterday it was "a horrible tragedy." But he denied the company had done anything wrong.

The trouble was that Radtke had not paid a $138 gas bill in three months. He had been warned and had indicated he would pay. But he didn't.

The last time Radtke's heat was turned off in June, his brother, Wilbert, of Lewiston, Idaho, paid the bill. The brother says he told the PSC if there was ever any trouble again to let him know. The PSC said it has no record of that.

Elderly Couple Found Frozen in Syracuse Home, The New York Times, Dec. 26, 1973.

THE NEW YORK TIMES, WEDNESDAY, DECEMBER 26, 1973

Elderly Couple Found Frozen in Syracuse Home

SCHENECTADY, N.Y., Dec. 25 (UPI) — A man and his wife, both in their 90's were found dead yesterday, apparently frozen to death in their unheated home.

Basil Heise, a serviceman on holiday leave, discovered the bodies of his grandparents when he went to their home to take them to a Christmas Eve dinner. The couple — Frank Baker, 93 years old, and his wife, Katherine, 91 — were found huddled together on their living room floor by Mr. Heise, who called the police.

A deputy county medical examiner, Dr. John Shields, said the couple had apparently been dead for about two days. He tentatively listed death as due to natural causes brought on by exposure, but said he would have an official ruling follow.

A spokesman for the Niagara Mohawk Power Corporation, which provides the area with electricity and natural gas, said power to the home had been turned off last Thursday for nonpayment of a five-month-old $202 bill.

Grandson Discovers Bodies— Utility Had Cut Off Power for Nonpayment of Bill

The elderly couple refused to allow a utility man into the home to shut off the gas, and it was still on at the time of their deaths, he said.

The utility spokesman said turning off the electricity to the home would have made any gas furnace inoperative, but would not have affected the use of a gas cooking stove, which could have provided some heat.

The utilities were cut off six months ago, he said, but were reinstated when a church paid the delinquent bill.

Contacted by the power company several times about their bill, the Bakers refused to discuss it, a power company spokesman said.

Last week, the telephone company cut off service, also for nonpayment of bills, a spokesman said.